IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 8, 2007 Session

STATE EX REL. PAULA A. FLOWERS, COMMISSIONER OF COMMERCE AND INSURANCE FOR THE STATE OF TENNESSEE v. UNIVERSAL CARE OF TENNESSEE, INC.

Appeal from the Chancery Court for Davidson County
No. 03-1614-II Carol McCoy, Chancellor

No. M2006-00929-COA-R3-CV - Filed October 22, 2007

This appeal involves a dispute between a provider of pathology testing services and the Liquidator of a TennCare managed care company in liquidation over the timeliness of the filing of a proof of claim form. After the Liquidator found the creditor's claim to be untimely, the creditor filed an objection in the liquidation proceeding pending in Chancery Court. The Chancellor determined the late filing was the result of excusable neglect and directed the Liquidator to classify the claim as timely filed. The Chancellor had the authority pursuant to Tenn. R. Civ. P. 6.02 to excuse the late filing of the claim on the basis of excusable neglect, and we find no error with the Chancellor's decision. Accordingly, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., joined. WILLIAM B. CAIN, J., not participating.

William B. Hubbard, Nashville, Tennessee, for the appellant, Universal Care of Tennessee, in Liquidation.

David L. Steed, Nashville, Tennessee, for the appellant, Quest Diagnostics.

Robert E. Cooper, Jr., Attorney General and Reporter; and Janet Irene M. Kleinfelter, Assistant District Attorney, for the appellee, State of Tennessee.

OPINION

Universal Care of Tennessee, Inc. ("Universal"), contracted with the State of Tennessee to act as a TennCare managed care company and thereby provide health care services to TennCare

enrollees.[1] In 2003, Universal defaulted on its obligations to pay outside healthcare providers for services rendered and was subsequently placed into liquidation in June of 2003 by the Chancery Court. During liquidation, all creditor-providers having claims against Universal were given notice of Universal's liquidation and the opportunity to submit claims to recover payment for unpaid monies. One such company to which Universal owed payments was Quest Diagnostics, Inc.

Quest Diagnostics, Inc. ("Quest") is a large national provider of pathology testing services. Quest provided laboratory services to Universal in the amount of $437,045, and Universal failed to voluntarily remit payment for Quest's services prior to liquidation. This appeal concerns Quest's attempts to collect on Universal's unpaid claims through liquidation procedures.

To oversee Universal's liquidation, the Chancery Court appointed as Liquidator, Paula Flowers, the Tennessee Commissioner of Commerce and Insurance. The court also appointed Paul Eggers as the Chief Deputy Liquidator to oversee the claims processing and distribution of the funds. Generally, the role of the Liquidator was to provide notice of liquidation and establish and oversee the procedure by which providers could seek payment for unpaid claims.

In January, 2004, the Liquidator officially informed all interested parties of Universal's liquidation by mailing the "Notice of Liquidation" ("Notice") to all potential claimants identified in Universal's database.[2] The Notice explained the reason for liquidation and provided instructions for submitting claims to the Liquidator via two different methods.

The Notice set forth specific instructions for the submission of Proof of Claim forms by the traditional method, whereby providers file a Proof of Claim accompanied by a copy of each unpaid claim. In an effort to streamline the claims process, the Liquidator established an additional, alternative method for the submission of proof of claims by which the Liquidator sent to each provider a list of all unpaid claims owed by Universal to the provider. The list or analysis, called the "Preliminary Liquidation Advice" ("PLA"), was generated based on the dollar amount that the Universal records displayed as unpaid. The Notice stated that providers "will receive an analysis (the 'Preliminary Liquidation Advice') of all claims that Universal received but did not pay or deny for the dates of service from July 1, 2001 through April 11, 2002." With regard to the PLA, the Notice further stated, "If you agree with the analysis, you need to sign and date the Acceptance attached to the Preliminary Liquidation Advice and return it to the Liquidator." The deadline for making all claims pursuant to either claim submission method was June 15, 2004.

In February, 2004, one month after mailing the Notice, the Liquidator mailed the second package to the potential creditor-providers containing the PLA. Accompanied by the PLA, the Liquidator sent to each provider a document titled "Instructions" and an "Acceptance Form" stating

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[1] TennCare is a state funded insurance plan primarily for underprivileged, disabled and uninsurable citizens of Tennessee.

[2] The Liquidator also employed various other methods of notification, such as publishing the Notice in five different newspapers throughout Tennessee and creating a website containing the pertinent information.

the balance owed by Universal to that specific provider. In order to complete the submission process with the PLA, providers needed to only return the Acceptance Form included in the mailings, as opposed to establishing proof of each individual claim.

The Liquidator contracted with a bulk mailer to perform the mailing of both the Notice and the second package containing the PLA. In January, 2004, the bulk mailer sent the Notice to Quest at three different addresses, including an address in Southeastern, Pennsylvania.[3] Quest, however, contends that it never received the Notice. In support of this contention, Quest offered two affidavits of employees holding the position of Accounts Receivable Management Regional Analyst during the relevant time period. The affidavits stated the file materials regarding Universal's liquidation did not include the Notice, and the records contain no indication that Quest received the Notice at the outset of the liquidation.[4] In addition, the person in charge of the bulk mailing could not identify the date on which the Notice was mailed, nor did he check the work of the employees who conducted the mailing.

The Liquidator also contracted with the same bulk mailer to mail the PLA; however, this mailing was delayed. Quest was notified of the delay by its locally hired counsel for liquidation matters, David Steed. On February 18, Steed received an e-mail from an attorney for the Liquidator advising that the overdue PLAs were to be mailed out starting the week of February 18, 2004. Steed, in turn, forwarded the e-mail to Quest's corporate counsel, Jeff Neff, who then forwarded it to the Quest billing department requesting for employees to anticipate the receipt of the incoming PLA.[5] By February 24, 2004, Quest had not received the PLA. As a result, Cristine Rotondo, a Quest employee, placed a call to the Liquidator to report Quest's non-receipt of the PLA. An employee at the Liquidator's office agreed to send the documents to Rotondo's attention; however, Quest maintains that neither Rotondo, nor anyone at Quest, received the documents.

On May 25, 2004, after a delay due to a lack of communication between Quest's local counsel and its corporate counsel, Steed, Quest's local counsel, began to work on Quest's 60,000 unpaid claims. At this point, three weeks remained before the June 15 deadline, and Quest maintains that neither it nor its counsel had received the necessary documents. Steed telephoned the Chief Deputy Liquidator, Paul Eggers, with questions and requested advice on how to pursue the submission of claims. Initially, Steed intended to submit the Proof of Claim forms by the traditional method, requiring a great deal of time and effort; however, Eggers told Steed if Quest's claims were

[3] In May 2003, Universal mailed a check to the Pennsylvania address and the check later cleared, leading to the conclusion that this address was working and valid. Jeff Ness, General Counsel for Quest, testified that the address was valid.

[4] An additional affidavit of an Accounts Receivable Management Regional Analyst working at Quest from February through April, 2004, was silent on whether Quest received the Notice.

[5] The e-mail did not mentioned the Instructions and Acceptance Form that were to be attached to the PLA.

listed on the PLA, Quest did not need to submit a formal Proof of Claim.[6] According to Steed, Eggers failed to mention that Quest would be required to submit the PLA Acceptance Form.

As of the May 25th conversation between Steed and Eggers, Quest contends that neither its employees nor its counsel had received the PLA, Instructions, or the Acceptance Form. Steed requested the PLA of Eggers, and on June 1, two weeks prior to the deadline, Eggers e-mailed Steed an electronic ".txt" copy of the PLA. However, the document did not contain information regarding the existence of or the need to file a PLA Acceptance Form. Steed expediently forwarded the document to Quest by e-mail for review and reconciliation with Quest's records.

Steed later obtained a compact disk ("CD") containing both the original ".txt" file he had previously received via e-mail and an additional PLA file in the form of a ".pdf" document. These documents contained essentially identical information except for the second to last page of the ".pdf" file. Buried on page 1798 of 1799 in the ".pdf" file were instructions indicating that Quest was required to return the PLA Acceptance Form in order for Quest to be included in the liquidation. The page stated in bold:

> **FAILURE TO RESPOND IN A TIMELY MANNER ACCORDING TO THESE INSTRUCTIONS WILL RESULT IN YOUR COMPUTED PAYABLE AMOUNT REFLECTED ON THIS PRELIMINARY LIQUIDATION ADVICE NOT BEING INCLUDED IN THE PROPOSAL TO DISTRIBUTE ASSETS WHICH WILL BE SUBMITTED FOR APPROVAL TO THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE.**

The last page of the ".pdf" file did not provide Quest with notice and only contained data which was very similar to that contained in the ".txt" file. As a result of a cursory overview of the ".pdf" document, Steed failed to notice language regarding the submission of the PLA Acceptance Form.

Shortly after reviewing both the ".pdf" and the ".txt" files, Steed forwarded both files to Quest's corporate counsel, Neff. In addition to sending the files, Steed also sent Neff an e-mail explaining "if [the Liquidator's] file appropriately indicates the amount due, then no further action is required." Although Steed was unaware at the time, this statement was factually incorrect because the submission of the PLA Acceptance Form was required for this method of submission.

Quest failed to submit the PLA Proof of Acceptance Form within the required deadline of June 15, 2004. On July 2, approximately two weeks after the deadline, Steed reviewed a financial statement filed in the liquidation proceedings that indicated other providers had received and returned an Acceptance Form to reflect agreement with the PLA. Upon reading the statement, Steed

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[6] Throughout the Universal liquidation, there were two classes of claims: (1) pre-claims, claims arising when Universal was contractually at risk for covering the cost of health care to TennCare enrollees and (2) post claims, claims arising when Universal was operating on a non-risk basis. All of Quest's claims in this matter are classified as pre-claims. Thus, the distinction is irrelevant to this appeal.

contacted the Liquidator and specifically requested an Acceptance Form. He filed the form the same day.[7]

The Liquidator deemed the filing to be "late-filed," following which Quest filed objections with the Liquidator contending its claims should be allowed as the result of excusable neglect; however, the Liquidator refused to alter her determination.[8] Quest appealed the Liquidator's determination to the Chancery Court, and the court appointed a Referee to hear the matter. The Referee conducted an evidentiary hearing and subsequently submitted a Report and Recommendation of Referee, which included his findings of fact and conclusions of law upholding the Liquidator's determination. Specifically, the Referee found that Quest's failure to timely file the Acceptance Form was inexcusable neglect.

Quest filed objections to the Referee's findings and conclusions. After reviewing the transcript of the hearing before the Referee, the Chancellor stated that she disagreed with the Referee's conclusions and was of the opinion that Quest's untimely filing was due to excusable neglect; however, the Chancellor did not reject the Referee's findings and conclusions due to the mistaken belief she could not reject the Referee's findings and conclusions unless they were "clearly erroneous." Thereafter, Quest filed a Motion to Alter or Amend contending the Chancellor reached an erroneous conclusion due to the fact she applied the wrong standard of review. After considering the motion, the Chancellor granted the motion to amend stating:

> [T]he Court has concluded that it should have applied a *de novo* standard of review, and should have given effect to its conclusion that the delay in filing was due to excusable neglect. Consequently, the Court should have ordered the Liquidator to deem Quest's claim to be timely. The Liquidator is now so ordered.

The Liquidator now appeals contending: (1) Quest did not overcome the presumption of its receipt of the mailed Notice which set forth the claim submission procedures; (2) Quest failed to act reasonably by not consulting the Notice explaining the submission procedures; (3) Quest failed to act reasonably by waiting until twenty-one days before the filing deadline to begin the process of claims submission; (4) Quest failed to act reasonably by concluding that it was not necessary for it to file its claims with Universal; and (5) the reasons for Quest not timely filing its claims were within its control.

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[7] On July 2, 2004, Steed faxed the Acceptance Form to the Liquidator. The original was filed on July 12, 2004.

[8] Under Tenn. Code Ann. § 56-9-330(a), a timely filed claim is classified as a "Class 2" claim, which has priority over all claims with the exception of the cost and expenses of the administration of the liquidation. A late filed claim is classified as a "Class 7" claim, which has significantly less priority in liquidation.

ANALYSIS

A.
LIQUIDATION AND THE LIQUIDATOR'S ROLE

In 1991, the Tennessee General Assembly created a comprehensive procedure for the liquidation of insolvent or otherwise destitute insurance companies with the enactment of the Insurers Rehabilitation and Liquidation Act.[9] Tenn. Code Ann. § 56-9-101; *State ex rel. McReynolds v. United Physicians Ins. Risk Retention Group*, 914 S.W.2d 491, 494 (Tenn. Ct. App. 1995). The stated purpose of the Act was to protect the interests of insureds, claimants, creditors and the public generally by providing a comprehensive scheme for the rehabilitation and liquidation of insurance companies. Tenn. Code Ann. § 56-9-101. The goal of the Act was to "provide an orderly and complete procedure for handling claims, especially third-party claims, in which all involved make some concessions to the common necessity, and no one absorbs a disproportionate share of the loss." *State ex rel. Sizemore v. United Physicians Ins. Risk Retention Group*, 56 S.W.3d 557, 563 (Tenn. Ct. App. 2001) (hereinafter *"Sizemore II"*).

The liquidation of an insurance company must be handled as efficiently, expeditiously, and economically as possible. *Id.* As such, the Act sets forth detailed assignments and procedures for the parties involved in the liquidation. The Commissioner of Commerce and Insurance, also known as the Liquidator, is afforded the responsibility to seek the liquidation of an insurance company. Tenn. Code Ann. § 56-9-305(a); *Sizemore II*, 56 S.W.3d at 563. The General Assembly, not the courts, have entrusted the Commissioner with the independent judgment and discretionary power to seek liquidation of insurance companies within the statutory guidelines. The Act states, "Whenever the commissioner believes further attempts to rehabilitate an insurer would substantially increase the risk of loss to creditors, policyholders or the public, or would be futile, the commissioner may petition the chancery court of Davidson County for an order of liquidation." Tenn. Code Ann. § 56-9-305(a).

Upon the Commissioner's petition to the Chancery Court, the court determines whether there exist proper statutory grounds for liquidation pursuant to those grounds specified in Tenn. Code Ann. § 56-9-306.[10] *See Sizemore II*, 56 S.W.3d at 563. If proper grounds are established, the court shall enter an order of liquidation and shall "appoint the commissioner and the commissioner's successors

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[9] Tennessee became one of the thirty-three jurisdictions that adopted the Insurers Rehabilitation and Liquidation Model Act ("Model Act") first drafted by the National Association of Insurance Commissioners in 1977. *State ex rel. Sizemore v. United Physicians Ins. Risk Retention Group*, 56 S.W.3d 557, 562 (Tenn. Ct. App. 2001).

[10] Tenn. Code Ann. § 56-9-306 provides fourteen separate grounds which can lead to the liquidation of an insurance company. *See* Tenn. Code Ann. § 56-9-301. The Commissioner has the sole prerogative to seek liquidation of an insurance company. Tenn. Code Ann. § 56-9-305(a). When the Commissioner petitions for liquidation, the trial court's role is to decide whether the Commissioner has demonstrated one of the grounds for liquidation in Tenn.Code Ann. § 56-9-306. If so, the trial court must enter an order of liquidation naming the Commissioner as the liquidator and vesting ownership of the insurance company's property in the Commissioner. Tenn. Code Ann. § 56-9-307(a).

in office liquidator and shall direct the liquidator forthwith to take possession of the assets of the insurer and to administer them under the general supervision of the court." Tenn. Code Ann. § 56-9-307(a). Additionally, the court, by operation of law, must vest ownership of all the company's property, contracts, and rights of action in the Commissioner. Tenn. Code Ann. § 56-9-307(a).

The Act affords the Commissioner, as Liquidator, the authority to appoint a Special Deputy Liquidator, Tenn. Code Ann. § 56-9-310(a), who is empowered to act for the Liquidator to, *inter alia*: (1) give notice of the liquidation proceedings to the affected parties; (2) establish a procedure for submitting claims; (3) undertake to set aside fraudulent transfers and preferential conveyances; (4) marshal the company's assets; (5) determine the priority of the claims in accordance with the statutory priorities; (6) provide a report to the trial court containing recommendations for the distribution of the company's marshaled assets; and (7) distribute available funds in the manner approved by the court. *Sizemore II*, 56 S.W.3d at 564 (citations omitted).[11]

The Liquidator is empowered to take steps reasonably calculated to "prevent the piecemeal and protracted processing of claims." *Sizemore II*, 56 S.W.3d at 564 (citing *State ex rel. McReynolds v. United Physicians Ins. Risk Retention Group*, 921 S.W.2d 176, 180 (Tenn. 1996)). This includes the authority to establish a deadline and procedure for claims submission. Tenn. Code Ann. § 56-9-311(b).

The Act affords the Liquidator substantial powers, however, it does not afford the Liquidator the authority or discretion to excuse a late filing if the claimant had knowledge of the claim prior to the deadline. *Sizemore II*, 56 S.W.3d at 566. Although the Liquidator is without authority to excuse a claimant from an untimely filing, the Chancery Court is not constrained to grant such relief. *Id*.; *see also State ex rel. Sizemore v. United Physician Ins. Risk Retention Group*, No. 01-A-01-9610-CH-0044, 1997 WL 181526, at *3 (Tenn. Ct. App. Apr. 16, 1997) (hereinafter "*Sizemore I*"). To the contrary, the doctrine of excusable neglect under Rule 6.02 of the Tennessee Rules of Civil Procedure is applicable to untimely filings in liquidation proceedings. *Sizemore II*, 56 S.W.3d at 567. Specifically, Rule 6.02 affords the Chancellor the discretion to "excuse the late filing of a claim if the claimant's failure to meet the deadline was the result of excusable neglect." *Sizemore II*, 56 S.W.3d at 566 (citing *Sizemore I*, 1997 WL 181526, at *2). In pertinent part Rule 6.02 reads, "When by statute or by these rules . . . an act is required . . . to be done at or within a specified time, the court for cause shown may, at any time in its discretion . . . permit the act to be done, where the failure to act was the result of excusable neglect." Tenn. R. Civ. P. 6.02.

B.
STANDARD OF REVIEW

The fact the Chancellor is afforded discretion under Tenn. R. Civ. P. 6.02 to excuse a late filing is significant because it sets into play a standard of review on appeal to this court that is very

[11] Tenn. Code Ann. § 56-9-310 provides further powers possessed by the Liquidator. Pursuant to Tenn. Code Ann. § 56-9-310, the Chief Deputy Liquidator possesses the same powers held by the Liquidator.

deferential to the discretion exercised by the Chancellor. *See Williams v. Baptist Memorial Hosp.*, 193 S.W.3d 545, 551 (Tenn. 2006). Accordingly, we will review the Chancellor's decision pursuant to the deferential "abuse of discretion" standard. *Id*.

A trial court abuses its discretion when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999) (quotation and citation omitted). The abuse of discretion standard does not permit an appellate court to substitute its judgment for that of the trial court. *See Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998). Thus, we will not reverse a trial court's determination concerning excusable neglect absent an abuse of discretion.

C.
EXCUSABLE NEGLECT

We begin our analysis of excusable neglect with the understanding that actions to which a deadline has been attached should be completed timely. The foregoing notwithstanding, Tennessee Rule of Civil Procedure 6.02 provides that an untimely action may be excused, and thus considered timely where the tardiness is due to excusable neglect.[12] "Allowing an untimely action to be effective in certain cases has been characterized as 'repair work when lawyers have good reasons.'" *Sizemore II*, 56 S.W.3d at 566 (quoting *Day v. Northern Ind. Pub. Serv. Corp*., 164 F.3d 382, 384 (7th Cir.1999)).

Excusable neglect encompasses "simple, faultless omissions to act and, more commonly, omissions caused by carelessness." *Sizemore II*, 56 S.W.3d at 567 (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993)). The doctrine of excusable neglect extends to "more than just acts beyond a party's control and intentional acts." *Sizemore II*, 56 S.W.3d at 567. It may apply to situations in which "failure to comply with a filing deadline is attributable to a filer's negligence." *Id.*

The courts have extended the doctrine to encompass a negligent mistake committed by the filer; however, the courts have also set boundaries on what constitutes excusable neglect and provided a list of factors to consider in making the determination. These factors include: (1) the danger of prejudice to the party opposing the late filing, (2) the length of the delay and its potential impact on proceedings, (3) the reason why the filing was late and whether that reason or reasons were within the filer's reasonable control, and (4) the filer's good or bad faith. *Sizemore II*, 56 S.W.3d at 567-70.

[12]The reader should not confuse Rule 6.02, at issue here, with Rule 60.02, which is not at issue here. Rule 6.02 at issue here, pertains to seeking relief from having missed a deadline for completing a task, as contrasted with Rule 60.02, which pertains to seeking relief from a final judgment, order or proceeding. Each rule employs the concept of excusable neglect, and the same meaning applies to both rules, *see World Relief Corp. of Nat. Ass'n of Evangelicals v. Messay*, Mo. M2005-01533-COA-R3-CV, 2007 WL 2198199, at *7 (Tenn. Ct. App. July 26, 2007), however, the rules have different applications.

In the present matter the Liquidator established June 15, 2004, as the deadline for submitting claims, and it is undisputed that Quest failed to file the necessary documents within the deadline established. Although Quest failed to file its claim timely, Universal concedes the late filing does not prejudice Universal and the delay will not impact the proceedings. Universal also concedes that Quest acted in good faith.[13]

With the foregoing concessions, three of the four relevant factors are resolved in favor of Quest. Thus, the determinative factor is why the filing was late and whether the reason it was late was within Quest's reasonable control. To make this determination, we will examine, as *Sizemore II* instructs, (1) whether the circumstances involved were under Quest's control, and (2) whether Quest was paying appropriate attention to the matter in light of the surrounding circumstances. *Sizemore II*, 56 S.W.3d at 570.

Whether the Circumstances Were Under Quest's Control

Whether the circumstances involved were under Quest's control depends in part on whether it was clearly established that Quest received the Notice, the PLA, and the PLA Acceptance Form distributed to the hundreds of creditors of Universal by the bulk mailer retained for this liquidation. The Referee found that the documents were *mailed* by the Liquidator's bulk mailer but the Referee determined there existed a question of fact as to whether Quest *received* the necessary documents. In the January 13, 2006 Order, the Chancellor noted that the Referee "accepted as true the position asserted by Quest that certain Quest employees believed in good faith that Quest did not receive Notice of the Liquidation or the PLA."[14]

Quest presented rebuttal evidence supporting the contention that the documents were not received. Quest's corporate counsel, Mr. Neff, was asked at the hearing whether any one of authority at Quest had received the Notice, to which he responded "No, we had not received any notices." In addition to Mr. Neff's testimony, Quest produced affidavits of two employees significantly involved in the liquidation process, Neveen Taher, Accounts Receivable Management Regional Analyst, and Steven Petko, who was Team Leader, Third Party Operations. Taher stated, "I have in my custody documents received by Quest relating to the Universal Liquidation. The file materials do not include a Preliminary Liquidation Advice, a Preliminary Liquidation Advice Acceptance Form, nor notices

[13] The Referee stated, "In reviewing the proof, the Referee is of the opinion that should the claim of Quest be considered timely filed by reason of excusable neglect, there would result no prejudice to the party opposing, the length of 'delay' is minimal with no serious impact on the proceedings, and that the filer acted in good faith." As a result, the Referee based his ruling on the reason for the delayed filing and whether it was within Quest's control.

[14] A finding that documents are properly mailed raises a presumption that the same documents are received. *U.S. Life Title Ins. Co. of New York v. Department of Commerce and Ins. of State of Tenn.*, 770 S.W.2d 537, 542 (Tenn. Ct. App. 1989). The presumption of receipt, however, may be overcome by evidence to the contrary. 29 AM. JUR. 2d *Evidence* § 262 (2007). In Tennessee, when evidence rebutting the presumption of receipt is presented, the evidence creates an issue of fact for the fact finder to decide. *U.S. Life Title Ins. Co. of New York v. Department of Commerce and Ins. of State of Tenn.*, 770 S.W.2d 537, 542 (Tenn. Ct. App. 1989); 9 J. Wigmore, Evidence in Trials at Common Law § 2519(B) (rev.1981)).

of the Liquidation." Petko stated, "Our records also contain no indication that Quest received a Notice of Liquidation at the outset of the Liquidation proceeding against Universal." While these statements alone do not defeat the presumption of receipt, they are within the purview of the trier of fact to consider when making a factual determination of receipt.

Neither the Referee nor the Chancellor made a finding that Quest received the documents. Moreover, neither of them found the issue to be outcome determinative. To the contrary, the Referee concluded that the decision in this case "does not totally hinge on whether the notices were *received*." The Chancellor concurred with the conclusion that the decision does not hinge on whether the notices were received by Quest.

We agree with the concurrent findings that there is a question of fact concerning whether Quest received the necessary documents and relevant information. We also concur with the conclusion that the issue in this case, whether the Chancellor erred by finding the late filing was the result of excusable neglect, is not dependent on this one fact, but on a number of circumstances.

Other relevant circumstances are revealed in the numerous findings of fact made by the Referee and Chancellor. The following are the more relevant findings of fact made by the Referee that were adopted by the Chancellor.

- Mr. Steed, as Quest's legal counsel, made considerable efforts to comply with what he believed to be the requirements for insuring that the claim of Quest was properly noted with the Liquidator, so that Quest would be regarded as timely filed, and the Liquidator's office was put on notice by Quest that it had not received the notice of liquidation and PLA.

- The attorney for Quest contacted Mr. Eggers, Chief Deputy Liquidator, in an attempt to assure that Quest properly filed its claim.

- It is clear that Mr. Eggers informed Mr. Steed that should Quest agree with then [sic] numbers contained in the PLA, that it was not necessary to provide the voluminous proofs of claim that Quest sought to avoid.

- The PLA Documents provided to counsel for Quest did not include a PLA acceptance form ("PLA Acceptance Form"), which was required by the Liquidator in the instance of a claimant who chose to simply "agree" with the numbers presented on the PLA and thereby avoid filing separate proofs of claim.

- The only reference to a PLA Acceptance form contained the PLA documentation provided to counsel for Quest from the Liquidator's office appears at the next to last page of the PLA. The final page of that document

is a summary of the numbers. The reference to the PLA Acceptance form does appear on the page preceding the summary.

- Subsequent to the receipt of the PLA, and prior to the deadline for filing, counsel for Quest wrote the following letter to Mr. Eggers: *Paul, thanks for your follow-up call. At this point, it appears that we have everything we need. I think ours are turning out to be all "pre claims", and it appears that they are probably on the PLA. Thanks again, David.* (Emphasis added by the Referee).

- Subsequent to the filing deadline, counsel for Quest received a document prepared by the Liquidator which caused him to be concerned about the need to file a "formal Acceptance Form," at which time counsel did what he could to remedy the problem by completing the form and returning it to the Liquidator by fax the same day.

In addition to the findings of the Referee, the Chancellor made findings of fact including the following:

- The document that purports to be the Preliminary Liquidation Advice, first transmitted via e-mail to Quest's attorney by the Chief Deputy Liquidator, Paul Eggers, contains no information regarding the existence of or need to file a Preliminary Liquidation Advice Acceptance Form.

- The second Preliminary Liquidation Advice, transmitted in a CD, contained an electronic version of the same information. The only statement regarding the need to file the Preliminary Liquidation Advice Acceptance Form appeared on page 1798 of the 1799 page of this second electronic file. A review of the first Preliminary Liquidation Advice documents transmitted would not have revealed the information regarding the Preliminary Liquidation Advice Acceptance Form.

- Quest's attorney said that the Chief Deputy Liquidator told him that it was not necessary to file a Proof of Claim if Quest agreed with the PLA figures. The Chief Deputy Liquidator did not recall making any mention of the need to file an Acceptance Form in the event that Quest agreed with PLA figures.

- Quest's attorney sent a letter to the Chief Deputy Liquidator, Paul Eggers, on June 2, 2004, thirteen days prior to the filing date. The letter stated, in substance, that Quest had received the Preliminary Liquidation Advice figures and that they seemed to include all of Quest's claims.

- Quest's June 2, 2004 letter does not, in and of itself, constitute the requisite Acceptance Form required by the Liquidator; it does, however, (a) constitute a writing that was sent, and, in the totality of the circumstances, (b) does reflect an intent to participate in the liquidation. There is nothing in the record to reflect that Quest waived its claim. The record reflects that Quest was earnest in its efforts to participate in the Liquidation and to take the appropriate steps.

Another fact and circumstance that is significant to the issue at hand is that the procedure adopted by the Liquidator for the filing of a claim was new and unique. The "PLA" method of filing adopted for this liquidation was different from any protocol previously utilized for a TennCare liquidation. As a result, Quest was particularly reliant on information provided by the Liquidator.[15] The record shows that the Liquidator did less than a stellar job of transmitting the requisite information to Quest. Furthermore, the Liquidator provided incomplete and confusing information to Quest.

An attorney for the Liquidator had informed Quest's local counsel, Mr. Steed, that Mr. Eggers was the point person who would be making the decisions regarding the acceptance of claims. Consequently, it was reasonable for Quest to rely on Mr. Eggers for accurate and complete information and instructions regarding the submission process; however, the information provided by Mr. Eggers was not complete and contributed to the errors that followed. Additionally, the Liquidator's office was slow in mailing the PLA and attached information. Quest expected to receive the PLA; however, the record indicates that neither Mr. Eggers nor anyone else at the Liquidator's office provided a copy of the PLA to Quest's legal counsel until approximately two weeks before the deadline. Further, when Quest eventually received the PLA, the only reference to the key document in this matter, the Acceptance Form, was buried on page 1798 of 1799 pages, sandwiched between two pages filled with numbers.

In an attempt to assure that Quest was properly submitting the claims, Mr. Steed telephoned Mr. Eggers three weeks before the June 15 deadline. During this conversation, Mr. Eggers explained that if Quest agreed to the numbers on the PLA, Mr. Steed need not submit a Proof of Claim; however, according to the Chancellor's findings, Mr. Eggers did not recall making any mention of the need to file an Acceptance Form in the event that Quest agreed with PLA figures. Further, during a hearing, the Referee asked Mr. Eggers the following question: "Now, prior to the June 15th deadline, in your conversations with Steed, *did you and he ever specifically talk about the acceptance form itself*?" Mr. Steed responded, "No."

As a result of Mr. Eggers' failure to mention the Acceptance Form and the Liquidator's failure to provide a PLA document that would reasonably reveal the presence of an Acceptance

[15] The record evidences the fact that Mr. Steed had previously attended a meeting regarding the procedure of submitting claims in the Universal Liquidation; however, this does not provide evidence sufficient for us to reverse the Chancellor's decision.

Form, Mr. Steed operated under the misunderstanding that Quest did not have to return any acceptance documents to the Liquidator if they agreed with the PLA. This is evidenced by Mr. Steed's e-mail to Quest's corporate counsel, Mr. Neff, explaining "if [the Liquidator's] file appropriately indicates the amount due, then no further action is required." This e-mail was clearly incorrect; however, based on the circumstances, it was reasonable for Mr. Steed to possess this mistaken belief. Based on the foregoing, we conclude that some of the significant circumstances were out of Quest's reasonable control.

Paying Appropriate Attention in Light of the Circumstances

The record supports a finding that Quest was paying appropriate attention to this matter in light of the surrounding circumstances. Among the many efforts made by Quest to pay appropriate attention to the claims process is that two of Quest's attorneys and numerous employees focused on the Universal liquidation. The findings set forth above demonstrate that Quest employees were aware of the impending deadline and took the initiative to contact the Liquidator's office in an attempt to obtain the PLA. In addition, Quest's local counsel, Mr. Steed, had significant contact not only with Mr. Eggers, but also with employees of Quest. Although Quest did not file the appropriate documents before the stated deadline, Mr. Steed promptly requested the Acceptance Form and expedited its submission to the Liquidator the day he recognized the problem. We therefore conclude that Quest, through its attorneys and employees, was paying appropriate attention to this matter in light of the surrounding circumstances.

IN CONCLUSION

Throughout the liquidation, the Liquidator was aware that Quest was attempting to comply with procedure and submit a timely claim. Moreover, long before the deadline, the Liquidator had independently determined the amount of the claim that was ultimately submitted by Quest. We therefore conclude that the late filing of Quest's claim did not prejudice Universal or delay the liquidation proceedings, Quest acted in good faith, the relevant and confusing circumstances in play were not entirely under Quest's control, and Quest had a number of responsible employees and representatives paying appropriate attention to the matter in light of the circumstances. With all of the relevant *Sizemore* factors resolved in Quest's favor, we affirm the ruling of the Chancery Court that the late filing was the result of excusable neglect.

The judgment of the trial court is affirmed, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against Universal Care of Tennessee, Inc.

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FRANK G. CLEMENT, JR., JUDGE